IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
FIRST APPEAL NO.2410 OF 2006

Smt.Sundari S. Shetty ...Appellant

vs.

1.The Brihan Mumbai Mahanagar Palika
2.Kutchhi House Cooperative
Housing Society Ltd. ...Respondents

Mr.Anand Grover i/b P.L.Mahadik for the Appellant
Mr.J.J.Xavier for the Respondent No.1
Mr.T.Subramanium Sr.Advocate with Ms Snehal Shah for the Respondent No.2.

CORAM: A.S.OKA,J.
DATE : JANUARY 15,2007.

ORAL JUDGMENT:

1. By order dated 3rd October 2006, this Appeal was ordered to be heard finally at admission stage. Heard learned Counsel for the Appellant, the learned Counsel for the first Respondent and the learned Counsel for the second Respondent.

2. The Appellant is the original Plaintiff. The suit filed by the Appellant-Plaintiff was disposed of by the Trial Court. First Appeal No.1683 of 2005 was preferred by the Appellant in this Court. The said Appeal was disposed of by a Judgment and Order dated 19th January 2006. This Court partly allowed the Appeal. The Judgment and Decree passed by the trial Court was set aside and the suit was remanded to the Trial Court to decide the same afresh in the light of the observations made in the said Judgment of this court. By the impugned Judgment and Decree in this Appeal, the learned Trial Judge dismissed

the suit. The learned Trial Judge has observed that after the order of remand, no further evidence was led by the Appellant-Plaintiff. Therefore, after considering the evidence which was already adduced prior to the remand, the learned Trial Judge dismissed the suit.

32. The learned Counsel for the Appellant fairly stated that he may not be able to justify the criticism made in the Memorandum of Appeal of the learned Trial Judge as regards failure by the learned Judge to give sufficient opportunity to the Appellant to lead further evidence. He submitted that there seems to be some default on the part of the Appellant-Plaintiff. However, he invited my attention to the Roznama of the proceedings and stated that on 14th March 2006, the suit could not be proceeded as the Presiding Judge was not available in the Trial court. He pointed out that on 17th June 2006, the constituted attorney of the Appellant-Plaintiff was present. He pointed out that the constituted attorney sought time on the ground that the Advocate appointed had returned the brief. The learned Counsel for the second Respondent submitted that the Appellant has not chosen to lead evidence though opportunities were available and therefore, no interference is called for. However, he submitted that in case this Court is inclined to pass the order of remand, time schedule for expeditious disposal of the suit may be fixed. The same is the submission of learned Counsel for the first

Respondent.

3. I have considered the submissions. In paragraph No.9 of the order dated 19th January 2006 in First Appeal no.1683 of 2006, this Court observed thus :

"9. In the ultimate analysis, in my opinion, appeal ought to succeed to the limited extent as referred to above. The parties are relegated before the Trial Court on the limited issue as to whether the structure referred to at Item No.11 in the letter dated 3-3-1989 corresponds to the offending structure in the suit notice dated 27-6-2001. the trial court shall decide that issue on its own merits in accordance with law."

In paragraphs 12 and 13 this Court observed thus ;

"12. The trial court may dispose of the remand proceedings as expeditiously as possible, preferably within six months from the receipt of writ of this Court.

13. Accordingly, this appeal partly succeeds on the above terms. The impugned judgment and decree is set aside and the matter is remanded to the trial court to decide the matter in terms of the observations made hereinabove in accordance with law. The parties shall

appear before the trial court ton 14-2-2006 to facilitate the trial court to schedule the date of hearing of the suit."

4. The Roznama of the suit after the order of remand shows that on 14th March 2006, the learned Presiding Judge was not available and therefore, the suit was adjourned. On 20th April 2006, the learned Trial Judge noted that he has received the writ of the High Court and he adjourned the matter for directions till 29th April 2006 to enable the parties to take steps. It appears that on 29th April 2006 and 4th May 2006 the Appellant and her Advocate remained absent. On 5th May 2006, an application was moved by the Advocate for the Appellant for adjournment which was rejected and the suit was kept on 17th June 2006. On the said date, constituted attorney of the Appellant was present. He pointed out to the learned Trial Judge that the application for transfer of the suit has been moved before the learned Principal Judge. The learned Judge noted in the order that the said Application was dismissed. The constituted attorney further stated that his Advocate has returned the brief to him as he was not interested in appearing. The learned Trial Judge, in view of the time bound programme fixed by this court did not grant the adjournment and kept the suit on 19th June 2006 for Judgment. On that date the Judgment was delivered.

5. It is true that the Appellant should have attended the court on 29th April 2006, 4th May 2006 and 5th May 2006. However, on 17th June 2006, the Appellant could not proceed with the suit as her Advocate had returned the brief.

6. In my view on 17th June 2006, the learned Trial Judge could have granted a reasonable time to the Appellant to engage the services of another Advocate. However, that was not done and the suit was dismissed.

7. Considering the aforesaid circumstances, in my view, the Appellant deserves to be granted one more opportunity to lead the evidence. Therefore, the decree will have to be set aside and the suit will have to be remanded back in terms of earlier order passed by this Court.

8. Hence, I pass the following order :

i) Impugned Judgment and Decree dated 19th June 2006 is quashed and set aside. L.C.Suit No.6157 of 2001 is restored to file.

ii) The suit is remanded to the trial court for deciding the same in terms of Judgment and Order dated 19th January 2006 passed in First Appeal No.1683 of 2005.

iii) It is obvious that the parties to the suit will be entitled to lead further evidence in the suit.

iv) Parties are directed to appear before the learned Principal Judge of the City Civil Court, Mumbai on 5th February 2007.

v) The learned Principal Judge of the City Civil Court will assign the suit to any other learned Judge for final disposal in accordance with his administrative convenience. After the suit is assigned to a particular court, parties will move the concerned court for appropriate directions.

vi) The suit shall be decided afresh in terms of order dated 19th January 2006 passed by this Court in First Appeal No.1683 of 2006 as expeditiously as possible and preferably on or before 31st July 2007. The Appellant will cooperate with the court for early disposal of the suit.

vii) Appeal is partly allowed in above terms.

viii) Writ to be sent expeditiously.

ix) The concerned Court and the parties to act upon an authenticated copy of this order.

JUDGE